No. 77-533

In the Supreme Court of the United States

OCTOBER TERM, 1977

JESS H. HISQUIERDO, PETITIONER

v.

ANGELA HISQUIERDO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On November 28, 1977, the Court invited the United States to participate in this case as *amicus curiae*. This brief expands on the brief we submitted before the Court granted the petition for a writ of certiorari.

QUESTION PRESENTED

The United States will address the question whether federal law prohibits the states from applying community property rules to a worker's expectation of receiving retirement benefits.

STATEMENT

A. The Railroad Retirement Act

The Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. (Supp. V) 231-231t, provides a system of retirement and disability benefits for persons employed in the railroad industry. Unlike private retirement systems, which typically are supported by voluntary or contractual contributions made by employees and employers, benefits payable under the Railroad Retirement Act are financed by means of employment taxes. The Internal Revenue Service collects the employment taxes under authority of the Railroad Retirement Tax Act (26 U.S.C. (and Supp. V) 3201 *et seq.*).

To qualify for benefits under the Act, persons must meet the eligibility requirements of 45 U.S.C. (Supp. V) 231a. Subsections (a) and (b) provide primary and supplemental benefits for specified categories of railroad employees, while subsection (c) provides additional benefits to spouses of such persons. In order to qualify for the benefits, a spouse must live with the employee, receive regular contributions from the employee for support, or be entitled to support from the employee under a court order. 45 U.S.C. (Supp. V) 231a(c)(3)(i). Benefits for a spouse terminate, however, when "the spouse and the [employee] are absolutely divorced." 45 U.S.C. (Supp. V) 231d (c)(3)(B).

The Railroad Retirement Act is modeled in most respects on the Social Security Act, 49 Stat. 622, as

amended, 42 U.S.C. (and Supp. V) 401 *et seq.*, which it displaces with respect to employment in the railroad industry. Like Social Security benefits, benefits payable under the Railroad Retirement Act are not contractual;[1] they are not part of the consideration earned by an employee and are not considered to be deferred compensation. Moreover, the right to receive a benefit under the Railroad Retirement Act is never "vested," because Congress may modify or withdraw that right at any time, even after an award of an annuity has been made.[2] *Flemming* v. *Nestor*, 363 U.S. 603; *Bernstein* v. *Ribicoff*, 299 F.2d 248, 251-252 (C.A. 3), certiorari denied, 369 U.S. 887; *Price* v. *Flemming*, 280 F.2d 956, 959 (C.A. 3). Taxes that were properly collected will not be refunded if the payment schedules change, and there is no exact correspondence between taxes paid by or on behalf of an employee and the benefits to which he may be entitled.

Numerous sections of the Social Security Act are incorporated, either directly or by reference, into the Railroad Retirement Act. The rate of tax now paid by railroad employees to the railroad retirement system equals the rate paid by non-railroad employees to the social security system. 26 U.S.C. (Supp. V) 3101

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[1] *Ruhl* v. *Railroad Retirement Board*, 342 F.2d 662, 666 (C.A. 7), certiorari denied, 382 U.S. 836. See also *Flemming* v. *Nestor*, 363 U.S. 603, 608-611; *Weinberger* v. *Salfi*, 422 U.S. 749.

[2] Congress substantially revised the Railroad Retirement Act in 1974, and it changes benefit schedules frequently.

and 3201. One component of a person's railroad retirement annuity is computed on the basis of formulas contained in the Social Security Act. Moreover, under minimum guarantee provisions of the Railroad Retirement Act, an annuitant is assured that he will receive benefits under the Act at least as great as he would have received if all of his employment had been subject to the Social Security Act. 45 U.S.C. (Supp. V) 231b.[3]

If an employee lacks sufficient railroad compensation and service credits to be eligible for benefits under the Railroad Retirement Act, his credits are transferred to the Social Security Administration, where they are treated as credits under that system. 45 U.S.C. (Supp. V) 231q. In addition, survivor benefits under the Railroad Retirement Act are paid on the basis of an employee's combined railroad retirement and social security employment credits. 45 U.S.C. (Supp. V) 231c. With respect to questions of family relationship, which are of crucial importance in determining entitlement to various benefits payable under the Railroad Retirement Act, many definitions and standards applied under that Act are the same as those applied under the Social Security Act. 45 U.S.C. (Supp. V) 231a(d).

[3] Under the financial interchange arrangement between the railroad retirement and social security systems, there is a computation of the amount of social security benefits which railroad retirement annuitants would have received if their employment had been subject to the Social Security Act. In addition, a computation is made of the amount of taxes under the Federal Insurance Contributions Act that railroad employees would have paid if they were covered by the Social Security Act. A transfer of the difference between those two amounts then is made either to the railroad retirement system or to the social security system, depending on the system in whose favor the difference exists. 45 U.S.C. (Supp. V) 231f(c)(2).

The Railroad Retirement Act provides that railroad retirement annuities are not subject to legal process and cannot be "anticipated" (45 U.S.C. (Supp. V) 231m):

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated * * *.

The only exception to the applicability of this rule is stated in Section 459 of the Social Security Act (42 U.S.C. (Supp. V) 659), which permits garnishment of railroad retirement benefits to satisfy an obligation for alimony or child support. A definitional statute added in 1977 provides that alimony "does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." Pub. L. 95-30, Section 501(d), 91 Stat. 160, adding Section 462(c), to be codified at 42 U.S.C. 662(c).

B. The Present Proceedings

Petitioner was employed by the Atchison, Topeka & Santa Fe Railroad from 1942 to 1975 and subsequently by the Los Angeles Union Passenger Terminal. Because those employers are covered by the Railroad Retirement Act, 45 U.S.C. (Supp. V) 231 (a)(1), petitioner will become eligible for retirement benefits under the Act at age 60 (Pet. App. 2).

Petitioner and respondent were married in 1958. They separated in 1972, and petitioner filed a petition for dissolution of the marriage in 1975 (A. 2). In an interlocutory decree, the state trial court divided the parties' community property equally between them (A. 4). The court held, however, that respondent had no interest in petitioner's expectation of receiving railroad retirement benefits (A. 4; Pet. App. 1-2). The state court of appeal affirmed, reasoning that the railroad retirement benefits are not contractual and that Section 231m precludes application of state community property laws (133 Cal. Rptr. 684). The court explained that "the federal law is most explicit * * * [and] [t]he interest or right given the *employee* is separate and distinct from that given to the spouse or wife or widow or widower * * *." (133 Cal. Rptr. at 686; emphasis in original).

The Supreme Court of California reversed (Pet. App. 1-12; 19 Cal. 3d 613, 139 Cal. Rptr. 590, 566 P.2d 224). Starting with the general rule that "[i]n California, retirement benefits resulting from employment during marriage are community property, subject to division in the event of dissolution of the mar-

riage" (Pet. App. 3), the court found no overriding contrary intent of Congress in the provisions of the Railroad Retirement Act. Although the court acknowledged that the Act prohibits assignment or anticipation of benefits, the court determined (Pet. App. 7) that "the essential purpose of section 231m [was] to bar creditors of the beneficiary from reaching annuity payments, rather than to prevent a spouse from vindicating her ownership interest in the pension." The court similarly rejected arguments based on the existence of a separate annuity for spouses (Pet. App. 9-10), finding no evidence that "Congress intended that although a spouse is entitled to both a separate annuity and the support of the railroad employee during marriage, both of these benefits are withdrawn upon divorce."

SUMMARY OF ARGUMENT

We do not quarrel in this case with determinations of state law. Although anticipated benefits under the Railroad Retirement Act are never vested, and thus may not be "property" at all in the strictest sense (see *Flemming* v. *Nestor*, 363 U.S. 603), the California state courts may legitimately treat them as property, and indeed as community property, so long as that treatment does not interfere with overriding federal interests. The question here, therefore, is simply whether the Railroad Retirement Act embodies such overriding federal interests. We believe that it does.

The starting point of our inquiry is *Wissner* v. *Wissner*, 338 U.S. 655. *Wissner* held that California could not apply its community property laws to insurance proceeds under the National Service Life Insurance Act, 54 Stat. 1008, 38 U.S.C. (1946 ed.) 801 *et seq.*, because "Congress ha[d] spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other" (338 U.S. at 658). The Court explained (*id.* at 659): "Whether directed at the very money received from the Government or an equivalent amount, the judgment below [upholding application of community property law] nullifies the soldier's choice and frustrates the deliberate purpose of Congress. It cannot stand."

The same reasoning applies here. The evident purpose of the Railroad Retirement Act was to provide security for retired or disabled workers within the railroad industry. Although the Act provides separate benefits for a qualifying spouse during marriage, 45 U.S.C. (Supp. V) 231a(c)(1), Congress enacted that provision, not to recognize an independent claim by spouses, but to augment benefits for workers with greater support obligations. The additional benefits terminate on divorce, when the worker presumably is again responsible only for himself. 45 U.S.C. (Supp. V) 231d(c)(3)(B). If divorced employees in community property states must nevertheless surrender one-half of their individual benefits to former spouses regardless of need, the security envisioned by Congress would be imperiled.

Congress has struck a balance between the rights of retired railroad workers and the rights of divorced spouses. While providing that annuities generally are exempt from garnishment or attachment, 45 U.S.C. (Supp. V) 231m, Congress has permitted garnishment to satisfy alimony or child support obligations. See 42 U.S.C. (Supp. V) 659. However, Congress has further specified that "alimony" does not include "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement * * *." Pub. L. 95-30, Section 501(d), 91 Stat. 160, adding Section 462(c), to be codified at 42 U.S.C. 662(c). It is not the province of the California courts to strike a different balance.

State courts remain free to make alimony awards to a divorced spouse based on need. In setting the amount of such awards, the state courts may take into account benefits payable to a covered employee under the Railroad Retirement Act. We say only that California may not routinely cut benefits for a retired railroad worker in two, regardless of the needs of the divorced spouse or the economic consequences to the retired worker.

ARGUMENT

BENEFITS PAYABLE TO RETIRED OR DISABLED WORKERS UNDER THE RAILROAD RETIREMENT ACT MAY NOT BE DIVIDED UNDER COMMUNITY PROPERTY LAWS

We start with an established premise: this Court does not sit to review questions of state law. *Herb* v. *Pitcairn*, 324 U.S. 117. "[Its] only power over

state judgments is to correct them to the extent that they incorrectly adjudge federal rights" (*id.* at 125-126). Unless the decision of the Supreme Court of California in this case disregards federal rights or policies, its correctness is not open to question here.

Petitioner's principal argument is that the expectation of receiving benefits under the Railroad Retirement Act is not "property" at all and, by definition, cannot be "community property." Benefits payable under the Act are not contractual, *Ruhl* v. *Railroad Retirement Board*, 342 F.2d 662, 666 (C.A. 7), certiorari denied, 382 U.S. 836, and the right to receive them is not vested. See *Flemming* v. *Nestor*, *supra*; *Bernstein* v. *Ribicoff*, *supra*. But the decision of the Supreme Court of California to treat unrealized federal benefits as property, even if erroneous, is not itself impermissible. It must be shown that the consequences of such treatment are inimical to the objectives of the federal program.

The Supreme Court of California observed that "whenever there is a conflict between a federal statute affording annuity or insurance benefits and state community property laws the federal statute must prevail" (Pet. App. 4). The court then determined, however, that application of its community property laws to benefits payable under the Railroad Retirement Act does not conflict with federal law. In our view, that conclusion is mistaken.

A. State Property Laws Must Yield To Federal Statutes

State property laws undoubtedly must give way to overriding federal policies. For example, in *Wissner* v. *Wissner*, 338 U.S. 655, an Army officer named his

mother and father as beneficiaries under his National Service Life Insurance Policy, making no provision for his wife. The National Service Life Insurance Act provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries * * *." *Id.* at 658. The Act further provided that payments to the beneficiary would be "exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 659. A California court held that the proceeds of the policy, which had been purchased with community funds, were community property; it ordered that one-half of the proceeds be paid to the widow by the named beneficiaries. *Id.* at 658.

This Court reversed, stating that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Ibid.* The Court said that "[w]hether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress." *Id.* at 659. Moreover, the Court found (*ibid.*), the diversion of future payments to be received by the beneficiary was a "seizure" prohibited by the anti-attachment provision of the Act.

The Court followed a similar analysis in *Free* v. *Bland*, 369 U.S. 663. The Supreme Court of Texas

held that Texas community property law took precedence over a Treasury Regulation creating a right of survivorship in United States Treasury Bonds. *Id.* at 664-666. This Court disagreed, observing that "[t]he clear purpose of the regulations is to confer the right of survivorship on the surviving co-owner. Thus, the survivorship provision is a federal law which must prevail if it conflicts with state law [citing *Wissner*]" (*id.* at 668).

These principles are not casually employed. State property interests "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *United States* v. *Yazell*, 382 U.S. 341, 352. But, once a conflict has been identified, its resolution does not depend on the comparative weights of the state and federal interests. "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, *supra*, 369 U.S. at 666.

The question in this case, therefore, is whether application of California's community property laws to petitioner's benefits conflicts with the policies of the Railroad Retirement Act.

B. The Railroad Retirement Act Does Not Provide Benefits To Divorced Wives And Limits The Extent To Which Benefits May Be Anticipated Or Attached

1. The Railroad Retirement Act of 1935, the predecessor of the present Act, was enacted to provide a comprehensive program of retirement and disability benefits for workers in the railroad industry. Although major rail companies had established private benefit plans, those plans had "fail[ed] to provide properly for the retirement of employees who should be retired." H.R. Rep. No. 1711, 74th Cong., 1st Sess. 10 (1935). Under the private plans, "[p]ensions [were] withheld, granted, reduced, or wholly discontinued at the pleasure of the employer" (*ibid.*). Congress anticipated that, after passage of the bill, "a reasonable annuity will provide enough to enable retired employees to enjoy the closing days of their lives with peace of mind and physical comfort" (*ibid.*).

The annuity plan was designed to help not only the retired worker but also the industry in general. The House Report, noting that older employees were discouraged from retirement by their dependence on wages, observed that "[t]he payment of wages to such employees prevents economies which would probably result from the payment of reasonable annuities" (*ibid.*). The Report estimated that most of the 60,000 railroad employees over 65 years of age would retire "if given assurance of reasonable protection during their remaining years" (*ibid.*). The retirement program thus would assure a continuing supply of jobs for younger workers.

The 1935 Act provided annuities only for the workers themselves.[4] It did not provide payments to current or former spouses, and the amount of the annuity did not depend on the marital status of the worker. The Act also stated that "[n]o annuity payment shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated." 49 Stat. 973; 45 U.S.C. (1970 ed.) 228*l*.

Although the 1935 Act did not expressly prohibit the reduction of a worker's benefits by application of state community property laws, we believe that such a reduction would have been inconsistent with the Act's objectives. A retiring worker faces a diminution in income to the extent that annuity payments fall short of prior wages. If the worker also were required to pay to his former spouse one-half of that diminished income—or at least one-half of the sum attributable to the years worked during marriage—his economic security in many cases would be severely threatened. To support himself, he might be required to continue work at his regular wages, with the attendant consequences that Congress by the 1935 Act sought to avoid.[5] Whether or not Congress was willing to tolerate this result in cases of need by the spouse (see pages 18-20, *infra*), it is unlikely that Congress wished to have the benefits diluted by a mechanical division of assets under community property laws.

[4] An exception was made for payments to a surviving spouse upon the death of a retired worker. 49 Stat. 970.

[5] This would not hold true in every case. For example, if a worker were married throughout his period of employment and divorced on the day of his retirement, his share of the income would actually increase whenever the entire annuity exceeded one-half of his prior wages and the annuity were not diminished by alimony or a community property division. But state law cannot be allowed to interfere with the congressional objective in most cases merely because in some cases the interference would not frustrate the federal policy.

The policies of the 1935 Act have been carried over into the present statute. Although the Act was amended in 1951 to provide an annuity for a qualifying spouse of a retired worker (65 Stat. 683; see 45 U.S.C. (Supp. V) 231a(c)(1)), the legislative history of the amendment makes clear that Congress did not intend to recognize any special right or interest that the spouse should have in the railroad retirement system. H.R. Rep. No. 976, 82d Cong., 1st Sess. 9, 49-50, 66 (1951); S. Rep. No. 890, 82d Cong., 1st Sess. 17-18, 21-22, 64 (1951). Congress simply chose to increase benefits for retired workers with greater support obligations, rather than to enact a general increase in benefits for all workers. Consistently with this objective, Congress provided that the spouse's benefit was to terminate on divorce, when the worker presumably was again responsible only for himself. 45 U.S.C. (Supp. V) 231d(c)(3)(B).

Indeed, despite the fact that a retired worker sometimes must make alimony payments from retirement income, Congress declined to provide a (divorced) spouse's benefit even to workers with support obligations under a court order, although it provided

such a benefit to a spouse during the period after separation but prior to divorce. 45 U.S.C. (Supp. V) 231a(c)(2)(i). Because there is no divorced spouse's benefit, a divorced worker may have less available benefits on which to live after a divorce; even without a community property division, a retired worker paying alimony would support two households on his annuity alone. The effect of the decision below is to increase this "divorce penalty" without any showing that a further reduction in a worker's available benefits is justified by the respective conditions of the parties.

The lack of provision for payments to former spouses is not accidental. In 1966 the Chairman of the Railroad Retirement Board, testifying before a congressional subcommittee, opposed a suggestion to eliminate discrepancies between the Railroad Retirement Act and Social Security Act with regard to residual death benefits for divorced widows.

> MR. HABERMEYER [the chairman]: * * * We doubt that, where a man has actually divorced his wife, or the wife divorced the husband, there is any good reason for paying her benefits after his death. Wouldn't it be better for any moneys flowing from his death to go to surviving children? For example, take the particular case of a man aged 55, who has worked in the railroad industry all of his life. At age 50 his wife divorces him, and he has adult children. Now, if he were to die covered under social security, she would draw monthly benefits as his surviving divorced

> wife. We feel that under our act we would rather have the moneys go to these adult children.
>
> * * * * *
>
> I think there is one big difference in the two systems in this respect. The benefits that the wife would get under social security would have no effect with regard to adult children. But because of the residual payment that we have, any payments we would make to the divorced wife would reduce the residual payments to which these children might become entitled. * * * We just feel that those moneys should flow to the children, the adult children, rather than to the divorced wife.
>
> * * * * *
>
> MR. MACDONALD: My last statement or question is, Isn't one of the main purposes of the bill as sent up—as I read, by the administration, but I take it by you people, really—to put social security and the railroad retirement on a par?
>
> MR. HABERMEYER: If we think that certain social security payments are not warranted, we feel that we don't have to follow.

(See Hearings on H.R. 7298 (Railroads: Technical Amendments to Railroad Retirement, Tax, and Unemployment Insurance Acts, and Providing Benefits for Students) before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess. 31 (1966).)

Although Congress has established certain benefits for divorced wives and widows under the Social Security Act, *e.g.*, 42 U.S.C. (and Supp. V) 402(b)(1),

it has not provided equivalent benefits under the Railroad Retirement Act. The decision not to do so appears to reflect a determination that the finite resources of the Railroad Retirement Fund should be expended for the benefit of retired workers and their children rather than divorced wives. Those policy choices, whatever their wisdom, are for Congress to make. They cannot be set aside because the states, in the application of their property laws, recognize different priorities.

2. The balance that Congress has struck between the claims of retired railroad workers and their divorced spouses is reflected in the anti-assignment provisions of the Act. The 1974 Act, like its predecessor, flatly prohibits assignment, attachment, or garnishment of annuity payments; it also provides that payments may not be anticipated. 45 U.S.C. (Supp. V) 231m. Community property divisions of benefits, whether called "assignments" or "anticipations" of benefits, would fall within the scope of this prohibition.

This blanket prohibition, however, is subject to a limited exception. Section 459 of the Social Security Act, 42 U.S.C. (Supp. V) 659, which overrides contrary provisions in other social insurance and retirement statutes, permits the garnishment of federal benefits to satisfy alimony or child support obligations. Congress enacted this provision in 1974 to combat increases in welfare payments resulting from an inability to compel payments of support obligations from solvent but unwilling parents. S. Rep. No. 93-

1356, 93d Cong., 2d Sess. 42-43 (1974). The exception is not limited to such cases, however, but applies "whether or not the family upon whose behalf the proceeding is brought is on the welfare rolls" (*id.* at 54).

Section 459, in turn, was affected by a 1977 amendment. Congress stated that "alimony" does not include "any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement * * *." Pub. L. 95-30, Section 501(d), 91 Stat. 160, adding Section 462(c), to be codified at 42 U.S.C. 662(c). Senator Nunn, the sponsor of the amendment before the Senate,[a] explained the definition of "alimony" in the following terms (123 Cong. Rec. S6727 (daily ed., April 29, 1977)):

> The amendment would define "alimony" * * * to mean periodic payments of funds for the support and maintenance of the spouse (or former spouse). It includes (subject to and in accordance with State law) separate maintenance, alimony pendente lite, maintenance, and spousal support. This definition is in keeping with the increasing State use of "support" terminology instead of "alimony." * * * The amendment also clarifies the committee intent that "alimony" does not include payments or transfers of property made in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses.

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[a] This portion of Public Law 95-30 was introduced as a floor amendment and was not discussed in the committee report accompanying the bill.

It is apparent from the terms of Public Law 95-30, and the brief remarks of Senator Nunn, that Congress intended to distinguish between payments necessary for "support" and payments based on the economic efforts of the parties during marriage. An exception for the anti-assignment statutes is recognized for the former purpose but not the latter.[7] This distinction is a reasonable one. "[T]he community property principle rests upon something more than the moral obligation of supporting spouse and children: the business relationship of man and wife for their mutual monetary profit. [Citation omitted.] Venerable and worthy as this community is, it is not, we think, as likely to justify an exception to the congressional language [of the anti-garnishment provision of the National Service Life Insurance Act] as specific judicial recognition of particular needs, in the alimony and support cases." *Wissner* v. *Wissner*, *supra*, 338 U.S. at 660.

The Supreme Court of California held that the anti-assignment provision of the statute is irrelevant because respondent "claims not as a creditor, but as an owner with 'a present, existing, and equal interest.'" Pet. App. 5-6, quoting *Phillipson* v. *Board of Administration*, 3 Cal. 3d 32, 44, 473 P.2d 765, 772. But that conclusion avoids the federal statute by begging the

[7] The Comptroller General has concluded that, in light of Section 459 and the 1977 amendment, Armed Forces retirement benefits are not subject to division under community property statutes. We attach a copy of the Comptroller General's opinion as an appendix to this brief.

question whether a spouse has such an interest or can have one under federal law, and in so doing ignores the teaching of *Wissner*. There the Court found a "flat conflict" between a federal statute almost identical to Section 231m and a state court judgment declaring insurance proceeds to be the community property of the decedent and his widow. The state court's decision in *Wissner* was based on a finding that the spouse had an interest in the insurance, just as the present decision was based on a finding that respondent has an interest in the retirement benefits. But, as the Court held in *Wissner*, that reasoning cannot survive the fact that the federal statute, there as here, gives the entire interest in the benefits to the wage-earner (or his beneficiary) and forbids anticipation, assignment or garnishment of the interest. When federal law designates a single beneficial owner in this manner, state law cannot say that there were "really" two beneficial owners all along.[8]

[8] These principles cannot be avoided by awarding the spouse more than half of the community property to offset the fact that the spouse has no claim to railroad retirement benefits. See *Wissner*, *supra*, 338 U.S. at 659. Section 231m prohibits the anticipation of retirement benefits in any manner. Moreover, an unequal distribution of other community property, without any demonstration of need for the spouse's support, would increase the threat of economic uncertainty for retired workers, contrary to the evident purpose of the Railroad Retirement Act. States have no license to frustrate congressional policy so long as they do it indirectly.

C. Needy Spouses May Receive Part Of The Railroad Retirement Benefits As Alimony

We recognize that spouses of railroad workers may be at a disadvantage, at least compared to spouses of workers covered by private pension plans, if the federal benefits cannot be treated as community property. But that is not a sufficient reason to depart from established principles in this case. The retirement annuity is a creation of Congress. As we have discussed (pages 13-14, *supra*), prior to passage of the Railroad Retirement Act of 1935, retired workers (and their spouses) had no assurance of a secure retirement but depended on the inadequate and often unfair programs of the private employers. The development of a sound retirement system for railroad workers at the least gives divorced spouses an opportunity to receive alimony payments in cases of need.

State courts may require support payments for divorced spouses; indeed, the spouses have been assured recourse to garnishment proceedings if necessary. 42 U.S.C. (Supp. V) 659. In setting the level of alimony payments, state courts may consider the amount of railroad retirement benefits to be received. The courts may also encourage the parties voluntarily to take such payments into consideration in reaching reasonable property settlements (although garnishment would not be available as a remedy for nonpayment). What the state courts may not do is divide the retirement payments in half as a matter of course, without regard for the needs of the divorced spouse or the effect on the retired worker.

If the denial of benefits to non-needy divorced spouses is harsh, Congress could amend the Railroad Retirement Act. As we have pointed out (page 17, *supra*), the Social Security Act extends benefits to divorced spouses in certain cases.[9] Should the denial of benefits to spouses of railroad workers remain a continuing problem, despite the availability of alimony payments, the remaining distinctions between social security and railroad benefits could be eliminated.

Other legislative choices are also available. The House of Representatives has recently passed a bill (H.R. 8771, 95th Cong., 2d Sess. (1978)) that would subject federal Civil Service retirement benefits to all court-ordered divisions in divorce actions, including divisions pursuant to community property settlements. One supporter of the bill (Rep. Schroeder) stated that it would change the fact that "under the supremacy clause (Article VI, cl. 2) of the Constitution, valid congressional enactments preempt conflicting State community property provisions." 124 Cong. Rec. H79 (daily ed., January 23, 1978). Another supporter (Rep. Harris) remarked that "this law may be a good model for our Federal pension plans * * *." *Id.* at H80. Thus, a legislative solution, if one is needed, is not beyond expectation.

In any event, this case is not one of special hardship. The California courts have not found that re-

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[9] The California court of appeal has held that retirement benefits under the Social Security Act are *not* community property. *Nizenkoff* v. *Nizenkoff*, 65 Cal. App. 3d 136.

spondent needs a portion of petitioner's retirement benefits for support. She has received one-half of the admitted community property and will be entitled to Social Security retirement payments of which petitioner will get no part. There is no reason to read the Railroad Retirement Act to allow her one-half of petitioner's railroad retirement benefits as well.

CONCLUSION

The judgment of the Supreme Court of California should be reversed.

Respectfully submitted.

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JUNE 1978.

APPENDIX

THE COMPTROLLER GENERAL
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Washington, D.C. 20548

DECISION

FILE: B-190985 DATE: April 18, 1978

MATTER OF:
Major Herbert G. Wells, USAF (Retired)

DIGEST:

1. An Air Force disbursing officer may not pay a retired officer's pay into the Registry of a Texas State court as directed by the court in a garnishment proceeding for the collection of the officer's debt to his former wife incident to a community property settlement, since community property is not within the definition of "alimony" for which the Federal Government has waived its immunity to State garnishment proceedings pursuant to 42 U.S.C. 659 (Supp. V, 1975).

2. The amount of a military member's or Federal employee's pay or salary subject to garnishment for child support or alimony pursuant to 42 U.S.C. 659 (Supp. V, 1975) is limited by section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. 1673(b) (1970), as amended by section 501(e), Title V, Public Law 95-30. Thus, a State court garnishment order, to the extent it exceeds such limitations should not be followed by a disbursing officer.

This action responds to a letter, with enclosures, from the Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $4,817.83 to the Registry, District Court of Foard County, Texas, pursuant to the order of that court for payment incident to a writ of garnishment of retirement benefits owed to Major Herbert G. Wells, USAF (Retired), 459-44-2925. The request was approved by the Department of Defense Military Pay and Allowance Committee and forwarded to us on December 30, 1977, as submission No. DO-AF-1283.

On January 21, 1977, the United States Attorney in Fort Worth, Texas, was served notice of application by Ellen V. Wells for a writ of garnishment against Major Wells based on a division of community property, included in a November 4, 1975 divorce decree, awarding Mrs. Wells $253.57 per month, plus a portion of cost of living or other increases, from her former husband's military retired pay. The notice indicated that Major Wells was indebted to Mrs. Wells and directed the United States, acting through the Department of the Air Force, to appear before the District Court of Foard County, Texas, and disclose the amount in which it was indebted to Herbert G. Wells for retired pay. Mrs. Wells subsequently moved to have the Air Force pay Major Wells' retirement pay into the Registry of the court to be held subject to the court's further orders. On June 3, 1977, the court granted the motion and entered the following order:

> "IT IS, THEREFORE, ORDERED, ADJUDGED, and DECREED that Defendant, United States Air Force and United States of America pay all monies that have been accumulated and that have come due and that will come due during the pendency of this suit to the extent of $4,817.83, and remit same in the amount of $4,817.83 into the Registry of the Court.
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> "IT IS FURTHER ORDERED that the monies paid into the Registry of this Court shall be held subject to the further orders of this Court."

In a legal memorandum submitted with the request for advance decision it is indicated that the member's debt to Mrs. Wells arises out of a community property settlement and not from child support, since there were no minor children of the marriage, or alimony, since under Texas law there is no alimony after divorce. It is also pointed out that under Texas law garnishment against "current wages" is prohibited. In addition, it is noted that the order to pay "all monies that have been accumulated and that have come due and that will come due" appears contrary to the maximum earnings subject to garnishment as prescribed by 15 U.S.C. 1673 as amended. Therefore, the Accounting and Finance Officer submits the following specific questions for consideration:

> "a. Is retired pay received by Herbert G. Wells 'current wages' within the meaning of Article 16, Section 28, Constitution of Texas?

"b. Based on Article 16, Section 28, Constitution of Texas, may a disbursing officer of the United States remit to the Registry of the Court pursuant to a Writ of Garnishment served pursuant to 42 U.S.C. § 659?

"c. Is a community property settlement from Texas excluded from the definition of alimony by Public Law 95-30 thereby demonstrating that such is not within the waiver of sovereign immunity?

"d. Based on PL 95-30, may a disbursing officer remit funds pursuant to a Writ of Garnishment and subsequent order purporting to compel the United States to pay into court to satisfy a community property obligation?

"e. May a disbursing officer remit funds in excess of the maximum prescribed by the Consumer Credit Protection Act (15 U.S.C. § 1673 (b)(2), as amended by PL 95-30) if so ordered by a state court?"

The primary question in this case is that addressed in questions c and d above. That is, may the disbursing officer pay over the member's retired pay to someone other than the member as directed by the State court's garnishment order to satisfy a community property debt?

Section 459 of the Social Security Act, as added by the Social Services Amendments of 1974, Public Law 93-647, January 4, 1975, 88 Stat. 2337, 2357, 42 U.S.C. 659 (Supp. V, 1975), operates to remove, in very limited circumstances, the bar of sovereign immunity that prevented garnishment of the pay of Federal employees and members of the Armed Forces.

That statute provides in effect that such pay due from, or payable by, the United States—

> "* * * shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations *to provide child support or make alimony payments.*" (Emphasis added.)

For the purpose of clarifying such garnishment provisions, section 501, Public Law 95-30, May 23, 1977, 91 Stat. 126, 157-162, amended the Social Security Act to, among other things, add section 462(c) defining the term "alimony" for the purpose of section 459 as follows:

> "(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. *Such term does not include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement,* equitable distribution of property, or other division of

property between spouses or former spouses." (Emphasis added.)

Since from the divorce decree, and in view of Texas law which does not provide alimony after divorce, it is clear that the debt for which the garnishment order was issued in this case arises out of a community property settlement and not from alimony, the United States is not subject to that garnishment order. See *Marin* v. *Hatfield*, 546 F. 2d 1230 (5th Cir. 1977), and *Kelly* v. *Kelly*, 425 F. Supp. 181 (W.D. La., 1977). Accordingly, there is no authority to pay Major Wells' retired pay to the Registry of the court, and payment on the voucher submitted may not be made. See 44 Comp. Gen. 86 (1964); 54 Comp. Gen. 424 (1974). Questions c and d are answered in the negative.

Questions a and b are predicated upon arguments relating to the validity of the court's order under Texas law. Since our answers to questions c and d provide a basis for response to the court's order and for the payment of the member's retired pay, answers to questions a and b will not be provided.

Also, while question e concerning limitations on the amount of pay subject to garnishment need not be answered for the purposes of this case, we believe the following to be appropriate. Section 501(e), Public Law 95-30, *supra*, 91 Stat. 161, in clarifying the garnishment provisions, also amended section 303(b) of the Consumer Credit Protection Act, Public Law 90-321, May 29, 1968, 82 Stat. 163, 15 U.S.C. 1673 (b) (1970), to provide that the maximum disposable

earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed—

> "(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and
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> "(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;
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> except that, with respect to the disposable earnings of any individual for any workweek, the 50 per centum specified in clause (A) shall be deemed to be 55 per centum and the 60 per centum specified in clause (B) shall be deemed to be 65 per centum, if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the twelve-week period which ends with the beginning of such workweek."

Those restrictions were clearly meant to apply to garnishment proceedings for child support or alimony authorized by section 459 of the Social Security Act. See the material included in the Congressional Record by Senator Russell Long, Chairman of the Senate Committee on Finance, in connection with the amendment to section 303(b) of the Consumer Credit Protection Act, 122 Cong. Rec. S10848, S10850 (daily

ed. June 28, 1976). Pursuant to section 303(c) of the Consumer Credit Protection Act, 15 U.S.C. 1673 (c), no court of the United States or any State may make, execute, or enforce any order or process in violation of section 303. Accordingly, it appears that to the extent a garnishment order exceeds the limitations in section 303, it would be unlawful and should not be followed by the disbursing officer. Question e is, therefore, answered in the negative.

/s/ R. F. Keller
Deputy Comptroller General
of the United States

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